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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF CALIFORNIA  
7

8 JOHN CHARLES HEFLEBOWER,

CASE NO. CV F 13-1121 LJO MJS

9 Plaintiff,

**ORDER TO DISMISS ACTION AND TO  
10 DENY INJUNCTIVE RELIEF  
11 (Doc. 3.)**

12 vs.

13  
14 U.S. BANK NATIONAL ASSOCIATION,  
15 et al.,

16 Defendants.  
17 \_\_\_\_\_/

18 **PRELIMINARY STATEMENT TO PARTIES AND COUNSEL**

19 Judges in the Eastern District of California carry the heaviest caseload in the nation,  
20 and this Court is unable to devote inordinate time and resources to individual cases and  
21 matters. This Court cannot address all arguments, evidence and matters raised by parties and  
22 addresses only the arguments, evidence and matters necessary to reach the decision in this  
23 order given the shortage of district judges and staff. The parties and counsel are encouraged to  
24 contact United States Senators Diane Feinstein and Barbara Boxer to address this Court's  
25 inability to accommodate the parties and this action.

26 **INTRODUCTION**

27 On July 19, 2013, pro se plaintiff John Charles Heflebower ("Mr. Heflebower") filed  
28 this action to challenge foreclosure of this Fresno property ("property") and to seek to enjoin a

1 July 22, 2013 property foreclosure sale. Mr. Heflebower's Verified Complaint ("complaint")  
2 claims that defendants<sup>1</sup> lack "rights to enforce the deed of trust in question by holding any  
3 valid assignment of it." This Court DISMISSES this action in the absence of viable claims and  
4 DENIES Mr. Heflebower's requested injunctive relief.

5 **DISCUSSION**

6 **Sua Sponte Dismissal**

7 The complaint fails to allege cognizable claims.

8 "A trial court may dismiss a claim sua sponte under Fed.R.Civ.P. 12(b)(6). . . . Such  
9 dismissal may be made without notice where the claimant cannot possibly win relief." *Omar v.*  
10 *Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9<sup>th</sup> Cir. 1987); *see Wong v. Bell*, 642 F.2d 359, 361-  
11 362 (9<sup>th</sup> Cir. 1981). Sua sponte dismissal may be made before process is served on defendants.  
12 *Neitzke v. Williams*, 490 U.S. 319, 324 (1989) (dismissals under 28 U.S.C. § 1915(d) are often  
13 made sua sponte); *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9<sup>th</sup> Cir. 1984) (court may dismiss  
14 frivolous in forma pauperis action sua sponte prior to service of process on defendants).

15 "When a federal court reviews the sufficiency of a complaint, before the reception of  
16 any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue  
17 is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer  
18 evidence to support the claims." *Scheurer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974);  
19 *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9<sup>th</sup> Cir. 1997). A F.R.Civ.P.  
20 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or "the  
21 absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica*  
22 *Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990); *Graehling v. Village of Lombard, Ill.*, 58 F.3d  
23 295, 297 (7<sup>th</sup> Cir. 1995).

24 In addressing dismissal, a court must: (1) construe the complaint in the light most  
25 favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3)  
26 determine whether plaintiff can prove any set of facts to support a claim that would merit  
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28 <sup>1</sup> Defendants are U.S. Bank National Association, Western Progressive, LLC, Ocwen Loan  
Servicing LLC, and JPMorgan Chase Bank, N.A. and will be referred to collectively as "defendants."

1 relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a  
2 court is not required “to accept as true allegations that are merely conclusory, unwarranted  
3 deductions of fact, or unreasonable inferences.” *In re Gilead Sciences Securities Litig.*, 536  
4 F.3d 1049, 1055 (9<sup>th</sup> Cir. 2008) (citation omitted). A court “need not assume the truth of legal  
5 conclusions cast in the form of factual allegations,” *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d  
6 638, 643, n. 2 (9<sup>th</sup> Cir.1986), and a court must not “assume that the [plaintiff] can prove facts  
7 that it has not alleged or that the defendants have violated . . . laws in ways that have not been  
8 alleged.” *Associated General Contractors of California, Inc. v. California State Council of*  
9 *Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897 (1983). A court need not permit an attempt to  
10 amend if “it is clear that the complaint could not be saved by an amendment.” *Livid Holdings*  
11 *Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9<sup>th</sup> Cir. 2005).

12 A “plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires  
13 more than labels and conclusions, and a formulaic recitation of the elements of a cause of  
14 action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554,127 S. Ct. 1955, 1964-65 (2007)  
15 (internal citations omitted). Moreover, a court “will dismiss any claim that, even when  
16 construed in the light most favorable to plaintiff, fails to plead sufficiently all required  
17 elements of a cause of action.” *Student Loan Marketing Ass’n v. Hanes*, 181 F.R.D. 629, 634  
18 (S.D. Cal. 1998). In practice, “a complaint . . . must contain either direct or inferential  
19 allegations respecting all the material elements necessary to sustain recovery under some  
20 viable legal theory.” *Twombly*, 550 U.S. at 562, 127 S.Ct. at 1969 (quoting *Car Carriers, Inc.*  
21 *v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7<sup>th</sup> Cir. 1984)).

22 In *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009), the U.S. Supreme Court  
23 explained:

24 . . . a complaint must contain sufficient factual matter, accepted as true, to  
25 “state a claim to relief that is plausible on its face.” . . . A claim has facial plausibility  
26 when the plaintiff pleads factual content that allows the court to draw the reasonable  
27 inference that the defendant is liable for the misconduct alleged. . . . The plausibility  
28 standard is not akin to a “probability requirement,” but it asks for more than a sheer  
possibility that a defendant has acted unlawfully. (Citations omitted.)

1 After discussing *Iqbal*, the Ninth Circuit Court of Appeals summarized: “In sum, for a  
2 complaint to survive [dismissal], the non-conclusory ‘factual content,’ and reasonable  
3 inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to  
4 relief.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 989 (9<sup>th</sup> Cir. 2009) (quoting *Iqbal*, \_\_ U.S.  
5 \_\_, 129 S.Ct. at 1949).

6 The U.S. Supreme Court applies a “two-prong approach” to address dismissal:

7 First, the tenet that a court must accept as true all of the allegations contained in  
8 a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of  
9 a cause of action, supported by mere conclusory statements, do not suffice. . . . Second,  
10 only a complaint that states a plausible claim for relief survives a motion to dismiss. . . .  
11 Determining whether a complaint states a plausible claim for relief will . . . be a  
12 context-specific task that requires the reviewing court to draw on its judicial experience  
and common sense. . . . But where the well-pleaded facts do not permit the court to  
infer more than the mere possibility of misconduct, the complaint has alleged – but it  
has not “show[n]” – “that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

13 In keeping with these principles a court considering a motion to dismiss can  
14 choose to begin by identifying pleadings that, because they are no more than  
15 conclusions, are not entitled to the assumption of truth. While legal conclusions can  
16 provide the framework of a complaint, they must be supported by factual allegations.  
When there are well-pleaded factual allegations, a court should assume their veracity  
and then determine whether they plausibly give rise to an entitlement to relief.

17 *Iqbal*, \_\_ U.S. \_\_, 129 S.Ct. at 1949-1950.

18  
19 As discussed below, the complaint is subject to dismissal in the absence of claims  
20 supported by a cognizable legal theory or sufficient facts alleged under a cognizable legal  
21 theory.

### 22 **Failure To Satisfy F.R.Civ.P. 8**

23 The complaint is subject to global attack for failure to satisfy F.R.Civ.P. 8, which  
24 requires a plaintiff to “plead a short and plain statement of the elements of his or her claim,  
25 identifying the transaction or occurrence giving rise to the claim and the elements of the prima  
26 facie case.” *Bautista v. Los Angeles County*, 216 F.3d 837, 840 (9<sup>th</sup> Cir. 2000).

27 F.R.Civ.P. 8(d)(1) requires each allegation to be “simple, concise, and direct.” This  
28 requirement “applies to good claims as well as bad, and is the basis for dismissal independent

1 of Rule 12(b)(6).” *McHenry v. Renne*, 84 F.3d 1172, 1179 (9<sup>th</sup> Cir. 1996). “Something labeled  
2 a complaint but written more as a press release, prolix in evidentiary detail, yet without  
3 simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to  
4 perform the essential functions of a complaint.” *McHenry*, 84 F.3d at 1180. “Prolix, confusing  
5 complaints . . . impose unfair burdens on litigants and judges.” *McHenry*, 84 F.3d at 1179.

6 Moreover, a pleading may not simply allege a wrong has been committed and demand  
7 relief. The underlying requirement is that a pleading give “fair notice” of the claim being  
8 asserted and the “grounds upon which it rests.” *Yamaguchi v. United States Department of Air*  
9 *Force*, 109 F.3d 1475, 1481 (9<sup>th</sup> Cir. 1997). Despite the flexible pleading policy of the Federal  
10 Rules of Civil Procedure, a complaint must give fair notice and state the elements of the claim  
11 plainly and succinctly. *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9<sup>th</sup> Cir. 1984).  
12 A plaintiff must allege with at least some degree of particularity overt facts which defendant  
13 engaged in to support plaintiff’s claim. *Jones*, 733 F.2d at 649. A complaint does not suffice  
14 “if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, \_\_ U.S. \_\_,  
15 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955). The U.S. Supreme  
16 Court has explained:

17 While, for most types of cases, the Federal Rules eliminated the cumbersome  
18 requirement that a claimant “set out in detail the facts upon which he bases his claim,”  
19 *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (emphasis added),  
20 Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, of entitlement to  
21 relief. Without some factual allegation in the complaint, it is hard to see how a claimant  
22 could satisfy the requirement of providing not only “fair notice” of the nature of the  
23 claim, but also “grounds” on which the claim rests.

24 *Twombly*, 550 U.S. at 556, n. 3, 127 S.Ct. 1955.

25 The complaint fails to satisfy F.R.Civ.P. 8. The complaint lacks facts of defendants’  
26 specific wrongdoing to provide fair notice as to what each defendant is to defend. The  
27 complaint lacks cognizable claims or legal theories upon which to support defendants' liability  
28 and rests on overbroad conclusions that defendants lack authority to foreclose on the property.  
The complaint lacks specific, clearly defined allegations of defendant’s alleged wrongs to give  
fair notice of claims plainly and succinctly to warrant dismissal of this action. Moreover, the

1 complaint's claims are subject to defenses and are based on legally deficient theories to further  
2 warrant dismissal.

### 3 **Failure To Tender Indebtedness**

4 Mr. Heflebower's failure to tender, and inability to tender, the amount owing on his  
5 loan dooms his global claims.

6 "A tender is an offer of performance made with the intent to extinguish the obligation."  
7 *Arnolds Management Corp. v. Eischen*, 158 Cal.App.3d 575, 580, 205 Cal.Rptr. 15 (1984)  
8 (citing Cal. Civ. Code, § 1485; *Still v. Plaza Marina Commercial Corp.*, 21 Cal.App.3d 378,  
9 385, 98 Cal.Rptr. 414 (1971)). "A tender must be one of full performance . . . and must be  
10 unconditional to be valid." *Arnolds Management*, 158 Cal.App.3d at 580, 205 Cal.Rptr. 15.  
11 "Nothing short of the full amount due the creditor is sufficient to constitute a valid tender, and  
12 the debtor must at his peril offer the full amount." *Rauer's Law etc. Co. v. S. Proctor Co.*, 40  
13 Cal.App. 524, 525, 181 P. 71 (1919).

14 A defaulted borrower is "required to allege tender of the amount of [the lender's]  
15 secured indebtedness in order to maintain any cause of action for irregularity in the sale  
16 procedure." *Abdallah v. United Savings Bank*, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286  
17 (1996), *cert. denied*, 519 U.S. 1081, 117 S.Ct. 746 (1997). "A party may not without payment  
18 of the debt, enjoin a sale by a trustee under a power conferred by a deed of trust, or have his  
19 title quieted against the purchaser at such a sale, even though the statute of limitations has run  
20 against the indebtedness." *Sipe v. McKenna*, 88 Cal.App.2d 1001, 1006, 200 P.2d 61 (1948).

21 In *FPCI RE-HAB 01 v. E & G Investments, Ltd.*, 207 Cal.App.3d 1018, 1021, 255  
22 Cal.Rptr. 157 (1989), the California Court of Appeal explained:

23 . . . generally "an action to set aside a trustee's sale for irregularities in sale notice or  
24 procedure should be accompanied by an offer to pay the full amount of the debt for  
25 which the property was security." . . . This rule . . . is based upon the equitable maxim  
26 that a court of equity will not order a useless act performed. . . . "A valid and viable  
27 tender of payment of the indebtedness owing is essential to an action to cancel a  
28 voidable sale under a deed of trust." . . . The rationale behind the rule is that if  
plaintiffs could not have redeemed the property had the sale procedures been proper,  
any irregularities in the sale did not result in damages to the plaintiffs. (Citations  
omitted.)

1 An action to set aside a foreclosure sale, unaccompanied by an offer to redeem, does  
2 not state a cause of action which a court of equity recognizes. *Karlsen v. American Sav. &*  
3 *Loan Assn.*, 15 Cal.App.3d 112, 117, 92 Cal.Rptr. 851 (1971). The basic rule is that an offer of  
4 performance is of no effect if the person making it is not able to perform. *Karlsen*, 15  
5 Cal.App.3d at 118, 92 Cal.Rptr. 851 (citing Cal. Civ. Code, § 1495). Simply put, if the offeror  
6 “is without the money necessary to make the offer good and knows it” the tender is without  
7 legal force or effect. *Karlsen*, 15 Cal.App.3d at 118, 92 Cal.Rptr. 851 (citing several cases). “It  
8 would be futile to set aside a foreclosure sale on the technical ground that notice was improper,  
9 if the party making the challenge did not first make full tender and thereby establish his ability  
10 to purchase the property.” *United States Cold Storage v. Great Western Savings & Loan Assn.*,  
11 165 Cal.App.3d 1214, 1224, 212 Cal.Rptr. 232 (1985). “A cause of action ‘implicitly  
12 integrated’ with the irregular sale fails unless the trustor can allege and establish a valid  
13 tender.” *Arnolds Management*, 158 Cal.App.3d at 579, 205 Cal.Rptr. 15.

14 “It is settled in California that a mortgagor cannot quiet his title against the mortgagee  
15 without paying the debt secured.” *Shimpones v. Stickney*, 219 Cal. 637, 649, 28 P.2d 673  
16 (1934); see *Mix v. Sodd*, 126 Cal.App.3d 386, 390, 178 Cal.Rptr. 736 (1981) (“a mortgagor in  
17 possession may not maintain an action to quiet title, even though the debt is unenforceable”);  
18 *Aguilar v. Bocci*, 39 Cal.App.3d 475, 477, 114 Cal.Rptr. 91 (1974) (trustor is unable to quiet  
19 title “without discharging his debt”).

20 Moreover, to obtain “rescission or cancellation, the rule is that the complainant is  
21 required to do equity, as a condition to his obtaining relief, by restoring to the defendant  
22 everything of value which the plaintiff has received in the transaction. . . . The rule applies  
23 although the plaintiff was induced to enter into the contract by the fraudulent representations of  
24 the defendant.” *Fleming v. Kagan*, 189 Cal.App.2d 791, 796, 11 Cal.Rptr. 737 (1961). “A  
25 valid and viable tender of payment of the indebtedness owing is essential to an action to cancel  
26 a voidable sale under a deed of trust.” *Karlsen*, 15 Cal.App.3d at 117, 92 Cal.Rptr. 851.  
27 Analyzing “trust deed nonjudicial foreclosure sales issues in the context of common law  
28 contract principles” is “unhelpful” given “the comprehensive statutory scheme regulating

1 nonjudicial foreclosure sales.” *Residential Capital v. Cal-Western Reconveyance Corp.*, 108  
2 Cal.App.4th 807, 820, 821, 134 Cal.Rptr.2d 162 (2003).

3 “The rules which govern tenders are strict and are strictly applied.” *Nguyen v.*  
4 *Calhoun*, 105 Cal.App.4th 428, 439, 129 Cal.Rptr.2d 436 (2003). “The tenderer must do and  
5 offer everything that is necessary on his part to complete the transaction, and must fairly make  
6 known his purpose without ambiguity, and the act of tender must be such that it needs only  
7 acceptance by the one to whom it is made to complete the transaction.” *Gaffney v. Downey*  
8 *Savings & Loan Assn.*, 200 Cal.App.3d 1154, 1165, 246 Cal.Rptr. 421 (1988). The debtor  
9 bears “responsibility to make an unambiguous tender of the entire amount due or else suffer the  
10 consequence that the tender is of no effect.” *Gaffney*, 200 Cal.App.3d at 1165, 246 Cal.Rptr.  
11 421.

12 Turning to the Truth in Lending Act (“TILA”), 15 U.S.C. §§ 1601, et seq., the “voiding  
13 of a security interest may be judicially conditioned on debtor’s tender of amount due under the  
14 loan.” *American Mortgage Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4<sup>th</sup> Cir. 2007).

15 15 U.S.C. § 1635(b) governs the return of money or property when a borrower has  
16 rescinded effectively:

17 . . . Within 20 days after receipt of a notice of rescission, the creditor shall return to the  
18 obligor any money or property given as earnest money, downpayment, or otherwise,  
19 and shall take any action necessary or appropriate to reflect the termination of any  
20 security interest created under the transaction. If the creditor has delivered any property  
21 to the obligor, the obligor may retain possession of it. Upon the performance of the  
22 creditor's obligations under this section, the obligor shall tender the property to the  
23 creditor, except that if return of the property in kind would be impracticable or  
24 inequitable, the obligor shall tender its reasonable value. Tender shall be made at the  
25 location of the property or at the residence of the obligor, at the option of the obligor. If  
26 the creditor does not take possession of the property within 20 days after tender by the  
27 obligor, ownership of the property vests in the obligor without obligation on his part to  
28 pay for it. The procedures prescribed by this subsection shall apply except when  
otherwise ordered by a court.

12 C.F.R. § 226.23(d) address rescission effects and provides:

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall  
return any money or property that has been given to anyone in connection with the  
transaction and shall take any action necessary to reflect the termination of the security



1 interest.

2 (3) If the creditor has delivered any money or property, the consumer may retain  
3 possession until the creditor has met its obligation under paragraph (d)(2) of this  
4 section. When the creditor has complied with that paragraph, **the consumer shall**  
5 **tender the money or property to the creditor** or, where the latter would be  
6 impracticable or inequitable, tender its reasonable value. At the consumer's option,  
7 tender of property may be made at the location of the property or at the consumer's  
8 residence. Tender of money must be made at the creditor's designated place of business.  
9 If the creditor does not take possession of the money or property within 20 calendar  
10 days after the consumer's tender, the consumer may keep it without further obligation.  
11 (Bold added.)

12 Neither TILA nor its Regulation Z, 12 C.F.R. §§ 226, et seq., “establishes that a  
13 borrower’s mere assertion of the right of rescission has the automatic effect of voiding the  
14 contract.” *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1172 (9<sup>th</sup> Cir. 2003) (quoting  
15 *Large v. Conseco Financing Servicing Corp.*, 292 F.3d 49, 54-55 (1<sup>st</sup> Cir. 2002)). The Ninth  
16 Circuit, relying on *Large*, explained:

17 Instead, the “natural reading” of the language of § 1635(b) “is that the security interest  
18 becomes void when the obligor exercises a right to rescind that is available in the  
19 particular case, either because the creditor acknowledges that the right of rescission is  
20 available, or because the appropriate decision maker has so determined. . . . Until such  
21 decision is made the [borrowers] have only advanced a claim seeking rescission.”

22 *Yamamoto*, 329 F.3d at 1172 (quoting *Large*, 292 F.3d at 54-55)).

23 A rescission notice is not automatic “without regard to whether the law permits  
24 [borrower] to rescind on the grounds asserted.” *See Yamamoto*, 329 F.3d at 1172. Entertaining  
25 rescission automatically “makes no sense . . . when the lender contests the ground upon which  
26 the borrower rescinds.” *Yamamoto*, 329 F.3d at 1172. “In these circumstances, it cannot be  
27 that the security interest vanishes immediately upon the giving of notice. Otherwise, a  
28 borrower could get out from under a secured loan simply by *claiming* TILA violations, whether  
or not the lender had actually committed any.” *Yamamoto*, 329 F.3d at 1172 (italics in  
original).

Moreover, although 15 U.S.C. § 1635(b) “provides for immediate voiding of the  
security interest and return of the money within twenty days of the notice of rescission, we

1 believe this assumes that the notice of rescission was proper in the first place.” *In re Groat*,  
2 369 B.R. 413, 419 (Bankr. 8<sup>th</sup> Cir. 2007). A “court may impose conditions on rescission that  
3 assure that the borrower meets her obligations once the creditor has performed its obligations.”  
4 *Yamamoto*, 329 F.3d at 1173. The Ninth Circuit has explained that prior to ordering rescission  
5 based on a lender’s alleged TILA violations, a court may require borrowers to prove ability to  
6 repay loan proceeds:

7           As rescission under § 1635(b) is an on-going process consisting of a number of  
8 steps, there is no reason why a court that may alter the sequence of procedures after  
9 deciding that rescission is warranted, may not do so before deciding that rescission is  
10 warranted when it finds that, assuming grounds for rescission exist, rescission still  
11 could not be enforced because the borrower cannot comply with the borrower's  
12 rescission obligations no matter what. Such a decision lies within the court's equitable  
13 discretion, taking into consideration all the circumstances including the nature of the  
14 violations and the borrower's ability to repay the proceeds. If, as was the case here, it is  
15 clear from the evidence that the borrower lacks capacity to pay back what she has  
16 received (less interest, finance charges, etc.), the court does not lack discretion to do  
17 before trial what it could do after.

18 *Yamamoto*, 329 F.3d at 1173 (affirming summary judgment for lender in absence of evidence  
19 that borrowers could refinance or sell property); *see American Mortgage*, 486 F.3d at 821  
20 (“Once the trial judge in this case determined that the [plaintiffs] were unable to tender the loan  
21 proceeds, the remedy of unconditional rescission was inappropriate.”); *LaGrone v. Johnson*,  
22 534 F.2d 1360, 1362 (9<sup>th</sup> Cir. 1974) (under the facts, loan rescission should be conditioned on  
23 the borrower’s tender of advanced funds given the lender’s non-egregious TILA violations and  
24 equities heavily favoring the lender).<sup>2</sup>

25           Neither the complaint nor record references Mr. Heflebower’s legitimate tender of  
26 indebtedness or meaningful ability to do so. The complaint’s references to offers to pay total

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27 <sup>2</sup> The Fourth Circuit Court of Appeals agrees with the Ninth Circuit that 15 U.S.C. § 1635(b) does  
28 not compel a creditor to remove a mortgage lien in the absence of the debtor’s tender of loan proceeds:

          Congress did not intend to require a lender to relinquish its security interest when it is now known that the  
borrowers did not intend and were not prepared to tender restitution of the funds expended by the lender in  
discharging the prior obligations of the borrowers.

*Powers v. Sims & Levin*, 542 F.2d 1216, 1221 (4th Cir. 1976).

1 amount due are unavailing in that the record fails to indicate that Mr. Heflebower followed up  
2 or acted to attempt to pay off his loan. Moreover, the fact that Mr. Heflebower has filed  
3 another action to avoid a foreclosure indicates inability to make a legitimate tender. *See John*  
4 *Charles Heflebower v. JP Morgan Chase Bank, N.A., et al.*, Case No. CV F 12-1671 AWI  
5 SMS. Mr. Heflebower's failure to indicate a legitimate tender of or ability to tender amounts  
6 outstanding is construed as his concession of inability to do so. Without Mr. Heflebower's  
7 meaningful tender, he seeks empty remedies, not capable of being granted. In addition, the  
8 complaint does not address conditions precedent to permit rescission even under TILA. The  
9 complaint is not a timely, valid rescission notice. "Clearly it was not the intent of Congress to  
10 reduce the mortgage company to an unsecured creditor or to simply permit the debtor to  
11 indefinitely extend the loan without interest." *American Mortgage*, 486 F.3d at 820-821.  
12 Without Mr. Heflebower's meaningful, legitmate tender, his purported claims are doomed.

### 13 **Foreclosure Sale Presumption**

14 Based on the record, foreclosure sale of the property is entitled to a presumption of  
15 validity to doom further Mr. Heflebower's claims.

16 Under California law, a lender may pursue non-judicial foreclosure upon default with a  
17 deed of trust with a power of sale clause. "Financing or refinancing of real property is  
18 generally accomplished in California through a deed of trust. The borrower (trustor) executes a  
19 promissory note and deed of trust, thereby transferring an interest in the property to the lender  
20 (beneficiary) as security for repayment of the loan." *Bartold v. Glendale Federal Bank*, 81  
21 Cal.App.4th 816, 821, 97 Cal.Rptr.2d 226 (2000). A deed of trust "entitles the lender to reach  
22 some asset of the debtor if the note is not paid." *Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th  
23 1226, 1235, 44 Cal.Rptr.2d 352 (1995).

24 If a borrower defaults on a loan and the deed of trust contains a power of sale clause,  
25 the lender may non-judicially foreclose. *See McDonald v. Smoke Creek Live Stock Co.*, 209  
26 Cal. 231, 236-237, 286 P. 693 (1930). The California Court of Appeal has explained non-  
27 judicial foreclosure under the applicable California Civil Code sections:

28 The comprehensive statutory framework established to govern nonjudicial

1 foreclosure sales is intended to be exhaustive. . . . It includes a myriad of rules relating  
2 to notice and right to cure. It would be inconsistent with the comprehensive and  
3 exhaustive statutory scheme regulating nonjudicial foreclosures to incorporate another  
unrelated cure provision into statutory nonjudicial foreclosure proceedings.

4 *Moeller v. Lien*, 25 Cal.App.4th 822, 834, 30 Cal.Rptr.2d 777 (1994); *see I.E. Assoc. v. Safeco*  
5 *Title Ins. Co.*, 39 Cal.3d 281, 285, 216 Cal.Rptr. 438 (1985) (“These provisions cover every  
6 aspect of exercise of the power of sale contained in a deed of trust.”)

7 Under California Civil Code section 2924(a)(1), a “trustee, mortgagee or beneficiary or  
8 any of their authorized agents” may conduct the foreclosure process. Under California Civil  
9 Code section 2924b(4), a “person authorized to record the notice of default or the notice of  
10 sale” includes “an agent for the mortgagee or beneficiary, an agent of the named trustee, any  
11 person designated in an executed substitution of trustee, or an agent of that substituted trustee.”  
12 “Upon default by the trustor, the beneficiary may declare a default and proceed with a  
13 nonjudicial foreclosure sale.” *Moeller*, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777.

14 “A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of  
15 the rights of the borrower and lender.” *Moeller*, 25 Cal.App.4th at 831, 30 Cal.Rptr.2d 777.  
16 “As a general rule, a trustee's sale is complete upon acceptance of the final bid.” *Nguyen v.*  
17 *Calhoun*, 105 Cal.App.4th 428, 440-441, 129 Cal.Rptr.2d 436 (2003). “If the trustee's deed  
18 recites that all statutory notice requirements and procedures required by law for the conduct of  
19 the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been  
20 conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser.”  
21 *Moeller*, 25 Cal.App.4th at 831, 30 Cal.Rptr.2d 777 (citations omitted). “A nonjudicial  
22 foreclosure sale is accompanied by a common law presumption that it ‘was conducted  
23 regularly and fairly.’” *Melendrez v. D & I Investment, Inc.*, 127 Cal.App.4th 1238, 1258, 26  
24 Cal.Rptr.3d 413 (2005) (quoting *Brown v. Busch*, 152 Cal.App.2d 200, 204, 313 P.2d 19  
25 (1957)). “This presumption may only be rebutted by substantial evidence of prejudicial  
26 procedural irregularity.” *Melendrez*, 127 Cal.App.4th at 1258, 26 Cal.Rptr.3d 413.

27 To challenge foreclosure, “it is necessary for the complaint to state a case within the  
28 code sections for which reason it is essential to allege the facts affecting the validity and

1 invalidity of the instrument which is attacked.” *Kroeker v. Hurlbert*, 38 Cal.App.2d 261, 266,  
2 101 P.2d 101 (1940).

3 A “trustee or mortgagee may be liable to the trustor or mortgagor for damages  
4 sustained where there has been an illegal, fraudulent or wilfully oppressive sale of property  
5 under a power of sale contained in a mortgage or deed of trust.” *Munger v. Moore*, 11  
6 Cal.App.3d 1, 7, 89 Cal.Rptr. 323 (1970).

7 The complaint lacks meaningful facts of a specific statutory irregularity or misconduct  
8 in foreclosure proceedings attributable specifically to defendants. Mr. Heflebower’s  
9 unsupported conclusory claims of absence of authority to foreclose offer nothing to  
10 substantiate a discrepancy in the foreclosure process. The complaint lacks allegations to  
11 overcome the presumption of foreclosure validity.

### 12 **Standing To Foreclose**

#### 13 ***Securitization***

14 To the extent the complaint challenges foreclosure given securitization of the Mr.  
15 Heflebower's promissory note, such challenge fails. Mr. Heflebower offers no meaningful  
16 support that the handling of his loan's promissory note or deed of trust ("DOT") thwarted the  
17 DOT’s power of sale.

18 The “request for declaratory relief is based on the erroneous theory that all defendants  
19 lost their power of sale pursuant to the deed of trust when the original promissory note was  
20 assigned to a trust pool. This argument is both unsupported and incorrect.” *Hafiz v.*  
21 *Greenpoint Mortg. Funding, Inc.*, 652 F.Supp.2d 1039, 1043 (N.D. Cal. 2009). “[C]ourts have  
22 uniformly rejected that securitization of a mortgage loan provides the mortgagor a cause of  
23 action.” *Velez v. The Bank Of New York Mellon*, 2011 WL 572523, at \*4 (D. Hi. 2011) (“The  
24 court also rejects Plaintiff's contention that securitization in general somehow gives rise to a  
25 cause of action – Plaintiff points to no law or provision in the mortgage preventing this  
26 practice, and otherwise cites to no law supporting that securitization can be the basis of a cause  
27 of action.”

28 Securitization of Mr. Heflebower’s note does not diminish the underlying power of sale

1 upon Mr. Heflebower’s default. Purported securitization claims fail to support a necessary  
2 irregularity to challenge foreclosure of the property.

3 ***Note Possession***

4 In addition, foreclosure is not dependent on possession of Mr. Heflebower’s original  
5 note.

6 “Under California law, there is no requirement for the production of an original  
7 promissory note prior to initiation of a nonjudicial foreclosure. . . . Therefore, the absence of an  
8 original promissory note in a nonjudicial foreclosure does not render a foreclosure invalid.”  
9 *Pantoja v. Countrywide Home Loans, Inc.*, 640 F.Supp.2d 1177, 1186 (N.D. Cal. 2009).  
10 “Pursuant to section 2924(a)(1) of the California Civil Code, the trustee of a Deed of Trust has  
11 the right to initiate the foreclosure process. Production of the original note is not required to  
12 proceed with a non-judicial foreclosure.” *Hafiz*, 652 F.Supp.2d at 1043 (citation omitted).

13 “Under Civil Code section 2924, no party needs to physically possess the promissory  
14 note.” *Sicairos v. NDEX West, LLC*, 2009 WL 385855, \*3 (S.D. Cal. 2009) (citing Cal. Civ.  
15 Code, § 2924(a)(1)). Rather, “[t]he foreclosure process is commenced by the recording of a  
16 notice of default and election to sell by the trustee.” *Moeller*, 25 Cal.App.4th at 830, 30  
17 Cal.Rptr.2d 777. “The trustee has the power and the duty to initiate foreclosure proceedings on  
18 the property upon the trustor's default, resulting in a sale of the property.” *Hafiz*, 652  
19 F.Supp.2d at 1043 (citation omitted). An “allegation that the trustee did not have the original  
20 note or had not received it is insufficient to render the foreclosure proceeding invalid.” *Neal v.*  
21 *Juarez*, 2007 WL 2140640, \*8 (S.D. Cal. 2007).

22 Inclusion of Mr. Heflebower’s note in an investor pool does not preclude foreclosure.  
23 Mr. Heflebower’s points as to inability to foreclose are unavailing given the absence of need to  
24 produce his original note. The clear authority is that production of original promissory notes is  
25 unnecessary to initiate foreclosure. Claims of pooling and service agreement (“PSA”)  
26 violations are insufficient given that Mr. Heflebower is not a PSA party and lacks grounds to  
27 enforce PSA provisions.

28 ///

1 **Authority To Assign Loan Documents**

2 The complaint's challenges to defendants' authority to assign loan documents are  
3 unavailing. The California Court of Appeal has explained that prejudice is required for a  
4 wrongful foreclosure claim:

5 We also note a plaintiff in a suit for wrongful foreclosure has generally been required to  
6 demonstrate the alleged imperfection in the foreclosure process was prejudicial to the  
7 plaintiff's interests. . . . Even if MERS lacked authority to transfer the note, it is difficult  
8 to conceive how plaintiff was prejudiced by MERS's purported assignment, and there is  
9 no allegation to this effect. Because a promissory note is a negotiable instrument, a  
10 borrower must anticipate it can and might be transferred to another creditor. As to  
11 plaintiff, an assignment merely substituted one creditor for another, without changing  
her obligations under the note. . . . If MERS indeed lacked authority to make the  
assignment, the true victim was not plaintiff but the original lender, which would have  
suffered the unauthorized loss of a \$1 million promissory note.

12 *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 272, 129 Cal.Rptr.3d 467 (2011);  
13 *see Knapp v. Doherty*, 123 Cal.App.4th 76, 86, n. 4, 20 Cal.Rptr.3d 1 (2004) (“A nonjudicial  
14 foreclosure sale is presumed to have been conducted regularly and fairly; one attacking the sale  
15 must overcome this common law presumption ‘by pleading and proving an improper procedure  
16 and the resulting prejudice.’”); *Angell v. Superior Court*, 73 Cal.App.4th 691, 700, 86  
17 Cal.Rptr.2d 657 (1999) (failure to comply with procedural requirements must cause prejudice  
18 to plaintiff).

19 Prejudice is not presumed from “mere irregularities” in the process. *Meux v. Trezevant*,  
20 132 Cal. 487, 490, 64 P. 848 (1901).

21 Mr. Heflebower’s papers lack allegations of requisite prejudice to Mr. Heflebower in  
22 connection with foreclosure, especially given his inability to tender amounts owed on his loans  
23 or to cure his default. The record lacks a defect as to defendants to disrupt foreclosure.

24 **Quiet Title**

25 The complaint unsuccessfully attempts to quiet the property's title in Mr. Heflebower's  
26 favor.

27 California Code of Civil Procedure section 760.010 provides for an action “to establish  
28 title against adverse claims to real or personal property or any interest therein.” California

1 Code of Civil Procedure section 761.020 mandates a “verified” complaint for a quiet title  
2 action to include:

- 3 1. A legal description and street address of the subject real property;
- 4 2. The title of plaintiff as to which determination is sought and the basis of the  
5 title;
- 6 3. The adverse claims to the title of the plaintiff against which a determination is  
7 sought;
- 8 4. The date as of which the determination is sought; and
- 9 5. A prayer for the determination of the title of the plaintiff against the adverse  
10 claims.

11 The quiet title remedy “is cumulative and not exclusive of any other remedy, form or  
12 right of action, or proceeding provided by law for establishing or quieting title to property.”  
13 Cal. Code Civ. Proc., § 760.030.

14 The complaint lacks facts as to the title of which Mr. Heflebower seeks determination  
15 and the basis of Mr. Heflebower’s purported title given his inability to tender amounts due on  
16 his loan. A quiet title claim requires an allegation that the plaintiffs “are the rightful owners of  
17 the property, i.e., that they have satisfied their obligations under the Deed of Trust.” *See Kelley*  
18 *v. Mortgage Electronic Registration Systems, Inc.*, 642 F.Supp.2d 1048, 1057 (N.D. Cal.  
19 2009). The complaint lacks facts that Mr. Heflebower is the property’s rightful owner, has  
20 satisfied DOT obligations and thus lacks a properly pled quiet title claim.

21 Moreover, a purported quiet title claim is doomed in the absence of a tender of amounts  
22 owed. “It is settled in California that a mortgagor cannot quiet his title against the mortgagee  
23 without paying the debt secured.” *Shimpones v. Stickney*, 219 Cal. 637, 649, 28 P.2d 673  
24 (1934). “A party may not without payment of the debt, enjoin a sale by a trustee under a power  
25 conferred by a deed of trust, or have his title quieted against the purchaser at such a sale, even  
26 though the statute of limitations has run against the indebtedness.” *Sipe v. McKenna*, 88  
27 Cal.App.2d 1001, 1006, 200 P.2d 61 (1948); *see Mix v. Sodd*, 126 Cal.App.3d 386, 390, 178  
28 Cal.Rptr. 736 (1981) (“a mortgagor in possession may not maintain an action to quiet title,



1 even though the debt is unenforceable”); *Aguilar v. Bocci*, 39 Cal.App.3d 475, 477, 114  
2 Cal.Rptr. 91 (1974) (trustor is unable to quiet title “without discharging his debt. The cloud  
3 upon his title persists until the debt is paid.”).

4 “A valid and viable tender of payment of the indebtedness owing is essential to an  
5 action to cancel a voidable sale under a deed of trust.” *Karlsen*, 15 Cal.App.3d at 117, 92  
6 Cal.Rptr. 851. An “action to set aside the sale, unaccompanied by an offer to redeem, would  
7 not state a cause of action which a court of equity would recognize.” *Copsey v. Sacramento*  
8 *Bank*, 133 Cal. 659, 662, 66 P. 7 (1901).

9 Mr. Heflebower is unable to quiet title in his favor without paying or tendering his  
10 outstanding indebtedness. With the complaint’s absence of a meaningful ability or willingness  
11 to tender the indebtedness, a purported quiet title claim fails. This Court is not in a position to  
12 award M. Heflebower a windfall.

### 13 **Unfair Business Practices**

14 The complaint fails to allege a viable claim under California Unfair Competition Law  
15 (“UCL”), Cal. Bus. & Prof. Code, §§ 17200, et seq.

16 “Unfair competition is defined to include ‘unlawful, unfair or fraudulent business  
17 practice and unfair, deceptive, untrue or misleading advertising.’” *Blank v. Kirwan*, 39 Cal.3d  
18 311, 329, 216 Cal.Rptr. 718 (1985) (quoting Cal. Bus. & Prof. Code, § 17200). The UCL  
19 establishes three varieties of unfair competition – “acts or practices which are unlawful, or  
20 unfair, or fraudulent.” *Shvarts v. Budget Group, Inc.*, 81 Cal.App.4th 1153, 1157, 97  
21 Cal.Rptr.2d 722 (2000).

22 “A plaintiff alleging unfair business practices under these statutes [UCL] must state  
23 with reasonable particularity the facts supporting the statutory elements of the violation.”  
24 *Khoury v. Maly's of California, Inc.*, 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708 (1993).

25 The complaint lacks facts of reasonable particularity to support a UCL claim. The  
26 complaint lacks actionable claims and in turn lacks a viable UCL claim to warrant its  
27 dismissal.

28 Moreover, the complaint fails to establish Mr. Heflebower's standing to pursue a UCL

1 claim.

2 California Business and Professions Code section 17204 limits standing to bring a UCL  
3 claim to specified public officials and a private person "who has suffered injury in fact and has  
4 lost money or property as a result of the unfair competition." "This provision requires  
5 [plaintiff] to show that she has lost 'money or property' sufficient to constitute an 'injury in fact'  
6 under Article III of the Constitution, *see Birdsong v. Apple, Inc.*, 590 F.3d 955, 959-60 (9th  
7 Cir.2009), and also requires a 'causal connection' between [defendant's] alleged UCL violation  
8 and her injury in fact, *Hall v. Time Inc.*, 158 Cal.App.4th 847, 70 Cal.Rptr.3d 466, 471-72  
9 (2008)." *Rubio v. Capital One Bank*, 613 F.3d 1195, 1204-1205 (9th Cir. 2010), *cert. denied*,  
10 131 S.Ct. 1817 (2011).

11 Business and Professions Code section 17203 addresses UCL relief and provides in  
12 pertinent part:

13 Any person who engages, has engaged, or proposes to engage in unfair  
14 competition may be enjoined in any court of competent jurisdiction. The court may  
15 make such orders or judgments . . . as may be necessary to restore to any person in  
16 interest any money or property, real or personal, which may have been acquired by  
17 means of such unfair competition.

18 "In a suit under the UCL, a public prosecutor may collect civil penalties, but a private  
19 plaintiff's remedies are 'generally limited to injunctive relief and restitution.'" *Kasky v. Nike,*  
20 *Inc.*, 27 Cal.4th 939, 950, 119 Cal.Rptr.2d 296 (2002) (quoting *Cel-Tech Communications, Inc.*  
21 *v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 83 Cal.Rptr.2d 548 (1999)). "The  
22 UCL limits the remedies available for UCL violations to restitution and injunctive relief . . ."  
23 *Madrid v. Perot Systems Corp.*, 130 Cal.App.4th 440, 452, 30 Cal.Rptr.3d 210 (2005).

24 The complaint lacks facts of Mr. Heflebower's money or property allegedly lost in that  
25 he was obligated to pay his loan and faced foreclosure if he failed to meet his obligations. In  
26 addition, the complaint lacks facts to support that Mr. Heflebower is entitled to restitution. The  
27 "notion of restoring something to a victim of unfair competition includes two separate  
28 components. The offending party must have obtained something to which it was not entitled  
and the victim must have given up something which he or she was entitled to keep." *Day v. AT*

1 & *T Corp.*, 63 Cal.App.4th 325, 340, 74 Cal.Rptr.2d 55 (1998). Mr. Heflebower’s loan  
2 payments fail to satisfy restitution elements in that he was obligated to make such payments.  
3 The complaint lacks facts, and Mr. Heflebower points to none, to support a UCL claim and Mr.  
4 Heflebower’s standing to seek UCL relief to warrant dismissal of a UCL claim.

### 5 Declaratory Relief

6 The complaint purports to seek declaratory relief that defendants lack a valid security  
7 interest in the property.

8 The FAC lacks a viable declaratory relief claim. The Declaratory Judgment Act  
9 (“DJA”), 28 U.S.C. §§ 2201, 2202, provides in pertinent part:

10 In a case of actual controversy within its jurisdiction . . . any court of the United  
11 States, upon the filing of an appropriate pleading, may declare the rights and other legal  
12 relations of any interested party seeking such declaration, whether or not further relief  
13 is or could be sought. Any such declaration shall have the force and effect of a final  
14 judgment or decree and shall be reviewable as such.

15 28 U.S.C. §2201(a).

16 The DJA’s operation “is procedural only.” *Aetna Life Ins. Co. of Hartford, Conn. v.*  
17 *Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 463 (1937). “A declaratory judgment is not a  
18 theory of recovery.” *Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd.*, 41 F.3d 764, 775  
19 (1<sup>st</sup> Cir. 1994). The DJA “merely offers an *additional remedy* to litigants.” *Nat’l Union Fire*  
20 *Ins. Co. v. Karp*, 108 F.3d 17, 21 (2<sup>nd</sup> Cir. 1997) (italics in original). A DJA action requires a  
21 district court to “inquire whether there is a case of actual controversy within its jurisdiction.”  
22 *American States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9<sup>th</sup> Cir. 1994).

23 Declaratory relief is appropriate “(1) when the judgment will serve a useful purpose in  
24 clarifying and settling the legal relations in issue, and (2) when it will terminate and afford  
25 relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.” *Bilbrey*  
26 *by Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir.1984).

27 As to a controversy to invoke declaratory relief, the question is whether there is a  
28 “substantial controversy, between parties having adverse legal rights, or sufficient immediacy  
and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co. v. Pacific*

1 *Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512 (1941). The U.S. Supreme Court has  
2 further explained:

3 A justiciable controversy is thus distinguished from a difference or dispute of a  
4 hypothetical or abstract character; from one that is academic or moot. . . . The  
5 controversy must be definite and concrete, touching the legal relations of parties having  
6 adverse legal interests. . . . It must be a real and substantial controversy admitting of  
7 specific relief through a decree of a conclusive character, as distinguished from an  
8 opinion advising what the law would be upon a hypothetical state of facts.

9 *Haworth*, 300 U.S. at 240-241, 57 S.Ct. at 464 (citations omitted).

10 The failure of the complaint's claims as a whole demonstrates the absence of an actual  
11 controversy subject to declaratory relief. A declaratory relief action "brings to the present a  
12 litigable controversy, which otherwise might only be tried in the future." *Societe de*  
13 *Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9<sup>th</sup> Cir. 1981). As an equitable  
14 remedy, declaratory relief is "dependent upon a substantive basis for liability" and has "no  
15 separate viability" if all other causes of action are barred. *Glue-Fold, Inc. v. Slautterback*  
16 *Corp.*, 82 Cal.App.4th 1018, 1023, n. 3, 98 Cal.Rptr.2d 661 (2000).

17 In the absence of a viable claim, the complaint fails to support declaratory relief. The  
18 complaint presents no litigable controversy to be tried in the future. The declaratory relief  
19 claim is subject to dismissal.

### 20 **Breach Of Contract**

21 The complaint alleges a breach of contract claim based on a consent order between the  
22 U.S. Department of Treasury and defendant JPMorgan Chase Bank, N.A. A breach of contract  
23 claim fails in the absence of an enforceable contract between Mr. Heflebower and defendants.

24 "The standard elements of a claim for breach of contract are: (1) the contract, (2)  
25 plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage  
26 to plaintiff therefrom." *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th  
27 1171, 1178, 80 Cal.Rptr.3d 6 (2008). "To form a contract, an 'offer must be sufficiently  
28 definite . . . that the performance promised is reasonably certain.'" *Alexander v. Codemasters*  
*Group Limited*, 104 Cal.App.4th 129, 141. 127 Cal.Rptr.2d 145 (2002).

1 Essential elements to contract existence are: (1) “[p]arties capable of contracting;” (2)  
2 “[t]heir consent;” (3) a “lawful object;” and (4) a “sufficient cause or consideration.” Cal. Civ.  
3 Code, § 1550.

4 “A written contract may be pleaded either by its terms – set out verbatim in the  
5 complaint or a copy of the contract attached to the complaint and incorporated therein by  
6 reference – or by its legal effect. In order to plead a contract by its legal effect, plaintiff must  
7 allege the substance of its relevant terms.” *McKell v. Washington Mutual, Inc.*, 142  
8 Cal.App.4th 1457, 1489, 49 Cal.Rptr.3d 227 (2006) (internal citations omitted).

9 The complaint fails to identify an enforceable contract to support a breach of contract  
10 claim to warrant dismissal of the breach of contract claim.

### 11 **Fair Debt Collection Practices Act**

12 The complaint's claim under the Fair Debt Collection Practices Act (“FDCPA”), 15  
13 U.S.C. §§ 1692, et seq., is legally barred.

14 The FDCPA makes it unlawful for debt collectors to use abusive tactics while  
15 collecting debts for others. *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5<sup>th</sup> Cir. 1985),  
16 *mod. on other grounds*, 761 F.2d 237 (5<sup>th</sup> Cir. 1985). The FDCPA defines a debt collector as  
17 “any person . . . who regularly collects or attempts to collect . . . debts owed or due or asserted  
18 to be owed or due another.” 15 U.S.C. § 1692a(6). A “debt collector” does not include a  
19 person who collects or attempts to collect a debt “to the extent such activity . . . concerns a debt  
20 which was not in default at the time it was obtained by such person.” 15 U.S.C. 1692a(6)(F).  
21 “The legislative history of section 1692a(6) indicates conclusively that a debt collector does  
22 not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt,  
23 as long as the debt was not in default at the time it was assigned.” *Perry*, 756 F.2d at 1208.

24 The complaint fails to substantiate defendants' status as a debt collector. *See*  
25 *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106 (6<sup>th</sup> Cir. 1996); *Kloth v. Citibank*  
26 *(South Dakota), N.A.*, 33 F.Supp.2d 115, 1998 (D. Conn. 1998) (“Generally, the FDCPA does  
27 not apply to creditors.”). The complaint lacks a valid FDCPA claim and facts that defendants  
28 engaged in conduct prohibited by the FDCPA.

1 **Real Estate Settlement Procedures Act**

2 The complaint alleges a legally barred claim under the Real Estate Settlement  
3 Procedures Act ("RESPA"), 12 U.S.C. §§ 2601, et seq.

4 ***Limitations Defense***

5 A RESPA claim is susceptible to 12 U.S.C. § 2614's one-year limitations for violations  
6 of 12 U.S.C. § 2607.<sup>3</sup> "The statute of limitations for private plaintiffs suing under RESPA is  
7 one year from the 'date of the occurrence of the violation.'" *Edwards v. First American Corp.*,  
8 517 F.Supp.2d 1199, 1204 (C.D. Cal. 2007) (quoting 12 U.S.C. § 2614). The "primary ill"  
9 which RESPA seeks to remedy is "the potential for 'unnecessarily high settlement charges'  
10 caused by kickbacks, fee-splitting, and other practices that suppress price competition for  
11 settlement services. This ill occurs, if at all, when the plaintiff pays for the service, typically at  
12 the closing." *Snow v. First American Title Ins. Co.*, 332 F.3d 356, 359-360 (5<sup>th</sup> Cir. 2003)  
13 (quoting 12 U.S.C. §2601(a)). The record reveals that Mr. Heflebower closed his loan in 2007,  
14 well more than a year prior to the complaint's July 19, 2013 filing to bar RESPA claims in  
15 connection with loan origination.

16 ***Absence Of Private Right Of Action***

17 A RESPA claim is further subject to dismissal in absence of a private right of action  
18 under RESPA for disclosure violations.

19 RESPA's purpose is to "curb abusive settlement practices in the real estate industry.  
20 Such amorphous goals, however, do not translate into a legislative intent to create a private  
21 right of action." *Bloom v. Martin*, 865 F.Supp. 1377, 1385 (N.D. Cal. 1994), *aff'd*, 77 F.3d 318  
22 (1996). "The structure of RESPA's various statutory provisions indicates that Congress did  
23 not intend to create a private right of action for disclosure violations under 12 U.S.C. § 2603 . .  
24 . Congress did not intend to provide a private remedy . . ." *Bloom*, 865 F.Supp. at 1384.

25 The absence of a private right of action dooms a purported RESPA claim based on  
26 disclosure violations. Moreover, the complaint lacks facts to support a RESPA violation or

27  
28 <sup>3</sup> 12 U.S.C. § 2607(a) prohibits referral payments for real estate settlement services, and 12 U.S.C. §  
2607(b) prohibits receipt of "any portion, split or percentage" of a settlement service fee, except for performed  
services.

1 claim.

2 **Attempt At Amendment And Malice**

3 Since the complaint’s claims are insufficiently pled and barred as a matter of law, Mr.  
4 Heflebower is unable to cure claims by allegation of other facts and thus is not granted an  
5 attempt to amend. Mr. Heflebower’s papers raise frivolous points which this Court need not  
6 address individually. *See Crain v. Commissioner*, 737 F.2d 1417, 1417 (5<sup>th</sup> Cir. 1984) (“We  
7 perceive no need to refute these arguments with somber reasoning and copious citation of  
8 precedent; to do so might suggest that these arguments have some colorable merit.”)

9 Moreover, this Court surmises that Mr. Heflebower brought this action in absence of  
10 good faith and seeks to exploit the court system solely for delay or to vex defendants and  
11 property foreclosure. The test for maliciousness is a subjective one and requires the court to  
12 “determine the . . . good faith of the applicant.” *Kinney v. Plymouth Rock Squab Co.*, 236 U.S.  
13 43, 46 (1915); *see Wright v. Newsome*, 795 F.2d 964, 968, n. 1 (11<sup>th</sup> Cir. 1986); *cf. Glick v.*  
14 *Gutbrod*, 782 F.2d 754, 757 (7<sup>th</sup> Cir. 1986) (court has inherent power to dismiss case  
15 demonstrating “clear pattern of abuse of judicial process”). A lack of good faith or malice also  
16 can be inferred from a complaint containing untrue material allegations of fact or false  
17 statements made with intent to deceive the court. *See Horsey v. Asher*, 741 F.2d 209, 212 (8<sup>th</sup>  
18 Cir. 1984). An attempt to vex or delay provides further grounds to dismiss this action.

19 **Injunctive Relief**

20 Mr. Heflebower seeks to enjoin property foreclosure.

21 F.R.Civ.P. 65(b)(1)(A) permits a temporary restraining order (“TRO”) “only if”  
22 “specific facts in an affidavit or a verified complaint clearly show that immediate and  
23 irreparable injury, loss, or damage will result to the movant before the adverse party can be  
24 heard in opposition.” As such, the Court may only grant such relief “upon a clear showing that  
25 the plaintiff is entitled to such relief.” *Winter v. Nat’l Res. Def. Council, Inc.*, 129 S.Ct. 365,  
26 375 (2008). To prevail, the moving party must show: (1) a likelihood of success on the merits;  
27 (2) a likelihood that the moving party will suffer irreparable harm absent preliminary injunctive  
28 relief; (3) that the balance of equities tips in the moving party’s favor; and (4) that preliminary

1 injunctive relief is in the public interest. *Winter*, 129 U.S. at 374. In considering the four  
2 factors, the Court “must balance the competing claims of injury and must consider the effect on  
3 each party of the granting or withholding of the requested relief.” *Winter*, 129 S.Ct. at 376  
4 (quoting *Amoco Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531 542 (1987)); *Indep. Living Ctr.*  
5 *of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009). Preliminary injunctive  
6 relief “is an extraordinary and drastic remedy, one that should not be granted unless the  
7 movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520  
8 U.S. 968, 972, 117 S.Ct. 1865 (1997) (citation omitted).

9 Mr. Heflebower’s papers lack necessary facts to show clearly the need for injunctive  
10 relief.

### 11 **Likelihood Of Success On Merits**

12 Pursuant to *Winter*, plaintiffs must make a “clear showing” that they are “likely to  
13 succeed on the merits.” *Winter*, 129 S.Ct. at 375-376; *Stormans*, 571 F.3d at 978. With  
14 dismissal of his claims, Mr. Heflebower is unable to show success on the merits.

### 15 ***California Civil Code Section 2923.5***

16 In his papers to request a temporary restraining order, Mr. Heflebower appears to claim  
17 that defendants did not comply with California Civil Code section 2923.5 ("section 2923.5").  
18 However, Mr. Heflebower alleges no section 2923.5 claim in his complaint.

19 Section 2923.5(a)(1) prohibits a mortgage servicer, mortgagee, trustee, beneficiary or  
20 authorized agent to “record a notice of default pursuant to Section 2924” until either “30 days  
21 after initial contact is made as required by paragraph (2) or 30 days after satisfying the due  
22 diligence requirements as described in subdivision (g).” Section 2923.5(a)(2) requires a  
23 “mortgage servicer” to “contact the borrower in person or by telephone in order to assess the  
24 borrower’s financial situation and explore options for the borrower to avoid foreclosure.”  
25 Section 2923.5(b) requires a default notice to include a declaration “that the mortgage servicer  
26 has contacted the borrower” or “has tried with due diligence to contact the borrower as required  
27 by this section.”

28 However, section 2923.5 offers no post-foreclosure relief. The California Court of



1 Appeal has explained:

2 There is nothing in section 2923.5 that even hints that noncompliance with the statute  
3 would cause any cloud on title after an otherwise properly conducted foreclosure sale.  
4 We would merely note that under the plain language of section 2923.5, read in  
5 conjunction with section 2924g, the only remedy provided is a postponement of the sale  
6 before it happens.

7 *Mabry v. Superior Court*, 185 Cal.App.4th 208, 235, 110 Cal.Rptr.3d 201 (2010); *see also*  
8 *Knapp v. Doherty*, 123 Cal.App.4th 76, 94, 20 Cal.Rptr.3d 1 (2004): (“slight procedural  
9 irregularity in the service of the Sale Notice did not cause any injury to Borrowers. They had  
10 notice of the original sale date; the trustee's sale did not go forward until almost one year after  
11 the date noticed. There was no prejudicial procedural irregularity.”)

12 Section 2923.5 supports no post-foreclosure claim or relief. If the foreclosure sale has  
13 occurred, section 2923.5 provides Mr. Heflebower no remedy.

14 Moreover, Mr. Heflebower fails to substantial application of section 2923.5. Section  
15 2923.5 applies “only to first lien mortgages or deeds of trust that are secured by owner-  
16 occupied residential real property containing no more than four dwelling units. For these  
17 purposes, ‘owner-occupied’ means that the property is the principal residence of the borrower  
18 and is security for a loan made for personal, family, or household purposes.” Cal. Civ. Code, §  
19 2924.15(a).

20 Mr. Heflebower is silent that the property is owner occupied. This Court construes  
21 such silence as Mr. Heflebower’s concession that he did not satisfy the owner-occupied  
22 requirement. Public records indicate that Mr. Heflebower holds title to several properties to  
23 further support that the property at issue here is not owner occupied. In addition, Mr.  
24 Heflebower offers nothing meaningful to challenge failure to satisfy section 2923.5 in that  
25 section 2923.5 “requires only contacts or attempted contacts in a good faith effort to prevent  
26 foreclosure.” *Ortiz v. Accredited Home Lenders, Inc.*, 639 F.Supp.2d 1159, 1166 (S.D. Cal.  
27 2009).

28 **Irreparable Injury Absent Injunctive Relief**

“Preliminary injunctive relief is available only if plaintiffs ‘demonstrate that irreparable

1 injury is *likely* in the absence of an injunction.” *Johnson v. Couturier*, 572 F.3d 1067, 1081  
2 (9th Cir. 2009) (quoting *Winter*, 129 S.Ct. at 375) (noting that the Supreme Court in *Winter*  
3 rejected the Ninth Circuit’s “possibility of irreparable harm” test). “Typically, monetary harm  
4 does not constitute irreparable harm.” *Cal Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847,  
5 851 (9th Cir. 2009). “Economic damages are not traditionally considered irreparable because  
6 the injury *can later be remedied by a damage award*.” *Cal Pharmacists*, 563 F.3d at 852  
7 (italics in original). However, “intangible injuries, such as damage to . . . goodwill qualify as  
8 irreparable harm.” *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944  
9 F.2d 597, 603 (9th Cir. 1001).

10 Mr. Heflebower fails to establish that he is entitled to prevent property foreclosure,  
11 especially with no record of his ability to tender outstanding amounts owed. Under the  
12 circumstances, loss of the property is not irreparable injury. Delaying foreclosure could cause  
13 irreparable harm to defendants’ interests.

#### 14 **Balance Of Equities**

15 The purpose of preliminary injunctive relief is to preserve the status quo if the balance  
16 of equities so heavily favors the moving party that justice requires the court to intervene to  
17 secure the positions until the merits of the action are ultimately determined. *University of*  
18 *Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

19 Mr. Heflebower fails to demonstrate that the balance of equities merits his requested  
20 injunctive relief. In fact, the balance of equities weighs in defendant’s favor as the record  
21 suggests that Mr. Heflebower may have unauthorized access to the property without payment  
22 of outstanding amounts owed. The equities further tip in defendants' favor given Mr.  
23 Heflebower's delay to seek injunctive relief by filing his papers during the late afternoon of  
24 Friday, July 19, 2013 with a foreclosure sale set for the morning of Monday, July 22, 2013.

#### 25 **Public Interest**

26 “In exercising their sound discretion, courts of equity should pay particular regard for  
27 the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 129 S.  
28 Ct. at 376-77 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). “The public

1 interest analysis for the issuance of a preliminary injunction requires [the Court] to consider  
2 whether there exists some critical public interest that would be injured by the grant of  
3 preliminary relief.” *Indep. Living Ctr., So. Cal. v. Maxwell-Jolly*, 572 F.3d 644, 659 (2009).

4 No meaningful public interest supports injunctive relief. Granting injunctive relief  
5 would be a disservice to public interest by allowing Mr. Heflebower to preclude foreclosure  
6 after his default and without legitimate tender of outstanding amounts owed.

7 **CONCLUSION AND ORDER**

8 This Court is familiar with Mr. Heflebower’s purported claims which many prior  
9 defaulted borrowers have pursued unsuccessfully. Neither Mr. Heflebower nor the record  
10 suggest a fair chance of success on the merits or irreparable harm given Mr. Heflebower’s  
11 default, inability to tender and dismissal of claims. This Court considers Mr. Heflebower’s  
12 injunctive relief request as a further tactic to attempt to delay foreclosure proceedings.  
13 Dismissal of this action removes doubt as to probable success of Mr. Heflebower’s claims or  
14 irreparable harm to him.

15 For the reasons discussed above, this Court:

- 16 1. DISMISSES without prejudice this action;
- 17 2. DENIES Mr. Heflebower requested injunctive relief; and
- 18 3. DIRECTS the clerk to enter judgment against plaintiff John Charles Heflebower  
19 and in favor of defendants and to close this action.

20  
21  
22  
23 IT IS SO ORDERED.

24 Dated: July 23, 2013

/s/ Lawrence J. O’Neill  
UNITED STATES DISTRICT JUDGE